

FEDERAL CIRCUIT COURT OF AUSTRALIA

*NGUYEN v MINISTER FOR IMMIGRATION &
ANOR*

[2018] FCCA 2485

Catchwords:

MIGRATION – Partner visa application – review of decision of Administrative Appeals Tribunal – whether genuine spousal relationship – whether the Tribunal erred in failing to put material to the applicant – section 375A certificate with respect to documents – application dismissed.

Legislation:

Migration Act 1958 (Cth) ss.65, 359A, 362, 375A, 376

Privacy Act 1988 (Cth)

Migration Regulations 1994 (Cth), cl.100.221

Cases cited:

Burton v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCA 1455; (2005) 149 FCR 20

MZAFZ v Minister for Immigration and Border Protection [2016] FCA 1081

Applicant:	HONG KHANH NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 512 of 2017
Judgment of:	Judge Riethmuller
Hearing date:	24 May 2018
Date of Last Submission:	24 May 2018
Delivered at:	Melbourne
Delivered on:	6 September 2018

REPRESENTATION

The Applicant appeared In Person

Counsel for the First Respondent: Ms Campbell

Solicitors for the First Respondent: Mills Oakley Lawyers

ORDERS

- (1) The application filed 14 March 2017 be dismissed.
- (2) The Applicant pay the First Respondent's costs fixed in the sum of \$5,400.
- (1)
- (2)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 512 of 2017

HONG KHANH NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal (“the Tribunal”) dated 17 February 2017 which affirmed the decision of a delegate to the Minister not to grant the applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (Cth) (“the Act”).
2. The criteria for the grant of a partner visa are set out in Pt.100 of Schedule 2 to the *Migration Regulations 1994* (“the Regulations”). The primary criteria includes cl.100.221(2) and (2A), relevantly to this matter; “the applicant is the spouse or de facto partner of the sponsoring partner.”

3. The applicant is a Vietnamese national, his sponsor is a Vietnamese woman who is an Australian permanent resident. The applicant met his sponsor in Vietnam in 2012 and they married in Vietnam. The applicant was granted a subclass 309 visa on 17 April 2013 and arrived in Australia a week later. The sponsor was, at that time, living in Perth (“the Perth address”). The applicant stated that he lived at the Perth address with the sponsor for about three weeks before relocating to Melbourne for work, where he resided with his sister and her family.
4. On 14 January 2016 the delegate decided not to grant a partner visa because the delegate could not be satisfied the applicant and the sponsor had a genuine and continuing spousal relationship. The applicant applied for review of that decision on 5 February 2016. On 17 February 2017 the Tribunal affirmed the decision of the delegate not to grant a partner visa on the same basis.

The applicant’s claims

5. The Tribunal set out details of the parties’ relationship at [8]-[20] of its decision. Both the applicant and the sponsor were previously married and have children from their prior relationships: see [8]-[10]. The parties met in Vietnam in 2012 and married: see [11]. Upon arriving in Australia, the applicant lived with the sponsor for three weeks at the Perth address before relocating to live with his sister in Melbourne: see [12].
6. The Tribunal recounted that on 15 September 2015 the Department of Immigration conducted a site visit to the Perth address and found neither party lived there saying:

[16] Further, upon interviewing the two persons then living there, one of whom claimed she had lived there for at least 12 months, neither recognised the photographs or the names of the parties when these were put to them.
7. A concurrent search was undertaken by the department officials at the applicant’s Melbourne address. The applicant was unaware that the sponsor was no longer living at the Perth address and did not have an updated address for her.

8. The sponsor was subsequently interviewed on 22 September 2015 “who told them that she had moved from the [Perth address] in late July or early August. The parties confirmed this during the hearing”: see [18] of the Tribunal’s decision. The applicant’s migration agent put in a change of address notice to the Department on 22 September 2015.
9. The Tribunal identified the issues, at [20], in the case as being; “whether the parties are, at the time of decision, in a genuine and continuing spousal relationship”.

The Tribunal’s findings

10. At [23], the Tribunal found the parties were validly married.
11. The Tribunal considered the parties’ finances noting their joint account but also and noting at [25] that “they do not have any joint assets or joint liabilities. As they rent a room in a house, there is no joint tenancy agreement”.
12. The parties each told the Tribunal they had been living apart for four years to save for the sponsor to buy and run a nail shop in Perth. However their evidence on the topic of savings was inconsistent:

[26]...the sponsor said that they needed to save between \$30,000 and \$50,000 and the applicant said they needed to save between \$50,000 and \$70,000. When asked how much they had saved towards that goal so far, the sponsor said they had between \$20,000 and \$30,000 while the applicant said they had between \$30,000 and \$40,000. Given that the parties are enduring the hardships of a long-distance relationship, apparently solely for financial purposes, I would expect their statement of the current finances and their savings goals to be reasonably precise and consistent.

13. At [28], the Tribunal had regard to the evidence relating to the nature of the parties’ household; despite him relocating to Melbourne in May 2013, the sponsor had “not visited her husband in Melbourne” (apart from the Tribunal hearing and a previous hearing that was cancelled).
14. The evidence (supported by boarding passes) was that the applicant had visited his wife in Perth and had spent:

[29]...35 days with his wife during the first 12 months the applicant lived in Australia, including three weeks or so before he relocated. In the second 12-month period, he spent 20 days with his wife. In the third 12-month period, he spent 30 days with his wife. Finally, between May 2016 and January 2017 he spent 24 days with his wife.

15. On this evidence alone it is difficult to see how the applicant could succeed in establishing that there was a continuing or ongoing relationship between him and his wife.

16. The parties' were unable to consistently state what they paid for rent and utilities in Perth:

[30] The sponsor said that the utilities were additional to the rent paid (of \$150 per week) and the additional cost of those utilities was about \$100 per week. The applicant said that the rent paid (of \$150 per week) included utilities.

17. The Tribunal considered the social aspects of the parties' relationship saying:

[33]...that the sponsor has only met the applicant's daughter on one occasion and that was in January 2017. Although other family members appear to be aware of the relationship, the parties were unable to evidence widespread social recognition by the community such as invitations to the parties, as a couple, to significant evidence like weddings or significant birthdays.

18. The Tribunal had regard to the evidence provided relating to the nature of the parties' commitment to each other and found that:

[35] The explanations as to why the sponsor could not join the applicant in Melbourne were vague and unsatisfactory. Similarly vague and unsatisfactory were the responses to the Tribunal's query about the financial benefit of paying for two households over the past four-year period.

19. Post-hearing, the Tribunal provided the parties' migration agent with a copy of a s.375A certificate and provided an opportunity to make post-hearing submissions as to its validity. At [37], the Tribunal considered the response "did not seek to challenge the validity of the certificate but sought better detail of the matters covered by the certificate". The

Tribunal found that “the relevant adverse information covered by the certificate was relevantly set out in the decision of the delegate”.

20. The Tribunal concluded that the applicant did not meet the criteria in cl.100.221 and did not satisfy the criteria for the grant of the visa. At [38], the Tribunal said it was “not satisfied that at the time of this decision the parties are in a spousal relationship”.

Grounds of the Application

21. Despite orders made on 9 November 2017, which had the effect of varying the directions for filing material, the applicant did not file any amended application or written submissions.
22. The applicant relies on the application filed 14 March 2017. He seeks orders that the Tribunal decision be quashed, a direction that the Tribunal reconsider the application. and costs.
23. The applicant’s grounds as set out in the application are:

1. The Tribunal failed to ask the question of whether my separation is permanent, and separation depends upon my wife and my mutual intention. The Tribunal never regarded to the fact of mutual intention.

2. The Tribunal did not give me particulars of the information in the documents that it had withheld under s. 375A. I was entitled to particulars of information even if had been withheld under the law.

3. The Tribunal’s decision not to give me particulars on information that had been withheld, as set out in its refusal on 17 February 2017 meant that the Tribunal decided my case without the fair hearing that I was entitled to under the Migration Act.

4. The Tribunal acted in breach of s. 359A of the Migration Act by not advising me in writing of information held by the Tribunal that would conclude that my wife is not in a genuine and continuing relationship with me.

Ground 1

24. In support of ground 1, the applicant argues that the Tribunal failed to have regard to a mutual intention on the part of him and his wife to continue their relationship. The fact that the parties may have been

intending to renew their relationship in the future, or resume it, is not determinative of the question the Tribunal had to answer under the Regulations. Similarly, whether or not the parties had a mutual intention to permanently separate was not determinative of the question. The Tribunal was required to determine whether or not the parties were currently in a genuine and continuing relationship, as the Tribunal identified at [4]. It is for this reason that the Tribunal traversed the various matters set out at [22] to [35] of the decision in order to ascertain whether or not the parties were in a genuine and continuing relationship.

25. The fact that parties may have brief periods of separation may not be determinative of the question in many cases. It is easy to imagine a situation where a person's work requires them to travel away for periods of time, yet the remainder of the facts and circumstances surrounding their relationship with their spouse clearly demonstrate that they are in an ongoing and continuing relationship, even though they have periods of separation caused by employment or other intervening factors.
26. To the extent that this ground seeks to have the Court review the merits of the decision reached by the Tribunal on the evidence before it, such a course is not open in judicial review proceedings. Even if such a course were open, it is difficult to see how, on the material before the Tribunal, the applicant would convince the Court that he was in a genuine and continuing relationship with his spouse.

Grounds 2 to 4

27. As is apparent from [36] of the Tribunal decision, that it provided a copy of the s.375A certificate to the advisor to the applicant in order to allow the advisor to provide submissions. The representative's response to the certificate appears at Court Book pp.208 to 209. The submissions from the advisor requested particulars of the information or documents covered by the certificate if they would form a reasonable part of the reason for affirming the refusal of the visa application, relying upon *Burton v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1455; (2005) 149 FCR 20. The Tribunal relied upon the fact that the particulars are set out in the decision of the delegate (see Court Book pp.45 to 49).

28. The first respondent, however, concedes that the certificate, on its face, is invalid, and therefore a nullity in accordance with *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081, even though this was not raised by the applicant's advisor or the applicant. It is apparent that the Tribunal acted upon the documents covered by the certificate, as appears in its reasons at [16] to [17] and [37], having regard to the documents which were annexed to an affidavit filed on the part of the first respondent. This was conceded in the first respondent's submissions. It is argued that the material was properly summarised in the delegate's decision, and the substance of the material was therefore known to the applicant.
29. Section 362A of the Act provides:
- (1) *Subject to subsections (2) and (3) of this section and sections 375A and 376, the applicant, and any assistant under section 366A, are entitled to have access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review.*
- (2) *This section does not override any requirements of the Privacy Act 1988. In particular, this section is not to be taken, for the purposes of that Act, to require or authorise the disclosure of information.*
- (3) *This section does not apply if the Tribunal has given the applicant a copy of the statement required by subsection 368(1).*
30. In this case, the exemptions in ss.375A and 376 do not apply. It is not argued that the *Privacy Act 1988* (Cth) has any application.
31. The material involved is extensive, running for nearly 100 pages. It includes documents headed "Partner Visa Processing", where an officer of the department expresses concerns about the genuineness of the relationship, although, on balance, recommends the approval of the visa on 2 April 2013 (see the affidavit of Siran Nyabally affirmed 16 April 2018 at annexure "SJN-1", pp.18 to 20). Thereafter, annexure "SJN-1" at pp.21 to 29, sets out a transcript of an interview with the applicant in April 2013. Extensive notes of concerns of departmental officers appear in annexure "SJN-1" at pp.32 to 47. Calculations of the dates of travel between Perth and Melbourne appear in annexure "SJN-1" p.49. Further notes expressing a suspicion with respect to the nature

of the relationship appear in annexure “SJN-1” at p.50. Thereafter, notes, interviews, site visit and interview plans and movement notes appear. The notes include extensive notes of the attendances at the residence, including details of the text messages on the parties’ telephone.

32. The summaries that appear in the delegate’s decision at Court Book pp.46 to 47, are in the following terms:

In assessing the genuine and continuing nature of the relationship with your sponsor, I must consider all of the circumstances of a relationship. I have considered the domestic living arrangements such as shared living spaces and daily routine as a reasonable test of whether you and your sponsor live together permanently in a spousal or de facto partner relationship.

In your statutory declarations dated 28/11/2014, you and your sponsor both claimed that you were living together at the residence of 131 Benara Road, Noranda WA 6062. You and your sponsor further state that you live apart on a temporary basis due to your current employment arrangements in Victoria. You also provided the Department a letter from the landlord and owner of this address, Hung Thanh Nguyen, claiming you both have resided together at the residence since 26/04/2013.

However, during the home visit by DIBP officers conducted on 15/09/2015, neither you or your sponsor could be located at the address of 131 Benara Road. Additionally, the current residents, Mr Des Farrell and Ms Tan Nguyen, when shown a photo of both you and your sponsor, stated to the officers that they did not recognize neither you or your sponsor.

Furthermore, during the simultaneous home visit conducted at the address of 17 Union Grove, you continued to state that your address in Perth was 131 Benara Road. You further stated that you last visited Perth on 18/07/2015 and that you stayed with your sponsor at this address. When DIBP officers advised you that the current residents of 131 Benara Road did not recognise you or your sponsor, you stated that maybe your sponsor was out at the time or had moved addresses. Given that one the residents, Ms Tan Nguyen, has lived at the Benara Road address for at least 12 months, I am not satisfied that you and your sponsor have cohabited together at 131 Benara Road.

I have also given consideration to the observations made by DIBP officers during the home visit conducted at 17 Union

Grove. During the visit, officers noted several pictures on your mobile phone of your ex-wife and daughter in the 17 Union Grove residence. In particular, one photo was of your ex-wife in a blue bathrobe on the double bed in your current bedroom. Officers then sighted on your bed the same bathrobe as was featured in the photo. Women's clothing and other beauty products were also sighted in your bedroom during the visit. Furthermore, officers identified homework and other paper work on a desk in your room with your daughter's name on it in addition to a single bed in one corner with a 'Hello Kitty' bedspread. Based on these findings, it appears that you reside in Melbourne with your ex-wife and daughter on a permanent basis and as such, I am not satisfied that you and your sponsor maintain a spousal relationship.

33. After recounting some further material provided by the applicant, the delegate also said:

Lastly, you have provided a boarding pass in your name departing from Melbourne and arriving in Perth on 18/07/2015. During the home visit conducted on 15/09/2015, you also stated that you last visited Perth in July 2015 for 3 days and that during this time, you stayed with your sponsor at the address of 131 Benara Road.

However, this contradicts with information collected at the home visit in which officers viewed your mobile phone records. Text messages from you to your sponsor indicated that you did not tell your sponsor that you were visiting Perth in July until the day after you had arrived. In particular, one text message dated 19/07/2015 at 12:56 pm stated "Can we talk over the phone for a bit (not talking about money). Don't worry. I'm in Perth. Something urgent has come up today." This also indicates that as of the afternoon of your second day in Perth (19/07/15), you and your sponsor had not seen each other face-to-face. Therefore, on the evidence provided, and taking into account the time you have lived apart and the contradictory responses regarding your living arrangements, I am not satisfied that you provide each other with companionship and emotional support, or that you have a joint commitment to a shared life.

Given all the factors considered, I find that you are not in an ongoing and genuine relationship. Furthermore, I find that you and your sponsor do not cohabit and your separate living arrangements appear to be of a permanent nature. I find that you are essentially leading separate lives, which further supports the

view that your marriage appears to have been contrived for the purposes of you obtaining permanent residency.

34. It is apparent that other parts of the Department's file have nonetheless been provided to the applicant during the process: for example, at Court Book p.173, submissions on behalf of the applicant refer to "folio 229 – 242 and 243 Department File (DF)" as setting out use of a particular phone by the applicant's daughter and various phone messages that were recorded by the Department. Similarly, at Court Book p.169, reference is made to folio 177 of the Department's file and at Court Book p.170 there is a reference to folio 158 of the Department's file. Whilst extensive material appears to have been provided to the applicant, the fact that a certificate issued with respect to the additional material indicates that the applicant had not received copies of it. There is no evidence before me that the substance of the material that was provided contained all of the information in the additional material.
35. From the material before this Court, it appears that a large part of the Department's file has been provided to the applicant. To the extent that the additional documents had not been provided, the substance of the material was notified to the applicant in the delegate's decision; however, the brief summary in the delegate's decision cannot hope to provide all of the detail contained in nearly 100 pages of documents.

Consideration of whether material provided to the applicant was sufficient

36. A complaint is also made that, in the alternative, the Tribunal has acted in breach of s.359A of the Act in not advising the applicant in writing of the information. That section provides as follows:

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and

the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies--by one of the methods specified in section 379A; or

(b) if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.

(3) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.

(4) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non-disclosable information.

(5) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 362B(1F).

37. The Minister says that the particulars of the information were contained in the delegate's decision, and that therefore the obligation under s.359A does not arise. This claim turns on whether or not the particulars provided in the delegate's decision were adequate to cover

the information contained in the documents purportedly covered by the invalid certificate.

38. The Tribunal said that the relevant adverse information in the documents is that summarised at [16] to [17] of its decision (see [37] of the decision). Those paragraphs record:

[16] In late 2014/ early 2015 the Department of Immigration began considering the relationship in relation to the issuance of the subclass 100 visa. To that end, officers of the Department conducted a site visit to the Benara Rd address on 15 September 2015 and found that neither party lived there (FN: Decision of the delegate of the Minister to refuse the subclass 100 visa, dated 14 January 2016, Tribunal file 1601333, folio 2). Further, upon interviewing the two persons then living there, one of whom claimed she had lived there for at least 12 months, neither recognised the photographs or the names of the parties when these were put to them [FN: Ibid].

[17] Immigration officers also undertook a site visit to the home the applicant was living in in Melbourne on 15 September 2015 [FN: Ibid]. The applicant appeared to be unaware that the sponsor was no longer living at Benara Rd and did not have an updated address for her [FN: Ibid]. The observations of the immigration officers suggested that the applicant may continue to be in a relationship with his former wife, who lived nearby [FN: Ibid].

39. Ultimately, I am persuaded that the substantive matters that arise from the department's investigation were set out in the particulars provided by the delegate, and that no further particulars would have been necessary in order to satisfy the relevant provisions of the Act. The issue was clearly a live issue before the Tribunal, and the applicant provided his evidence in this regard. Ultimately, I am persuaded that the applicant is unable to demonstrate jurisdictional error in this particular case. Even if I am in error with respect to the particulars I would exercise the discretion not to grant relief as there was no practical injustice to the applicant in the evidence of this case, nor that it could have resulted in a different outcome.
40. Accordingly, I make the orders that appear at the beginning of this judgment.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Date: 6 September 2018